FILE COPY.

NO. 18578.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 66.

Office Supreme Court U. S.
FILED
NOV 9 1903
JAMES H. McKENNEY, Clerk

JOHN ARBUCKLE, ET AL.,

APPELLANTS.

vs.

JOSEPH E. BLACKBURN, DAIRY AND FOOD COMMISSIONER OF THE STATE OF OHIO.

APPELLEE.

BRIEF FOR APPELLEE.

ROSCOE J. MAUCK,
EDMOND B. DILLON,
Solicitors for Respondent.

F. B. TOOTHAKER, Law Printer, 81-87 N. Third St., Columbus, O.

NO. 18578.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 66.

JOHN ARBUCKLE, ET AL.,

APPELLANTS.

vs.

JOSEPH E. BLACKBURN, DAIRY AND FOOD COMMISSIONER OF THE STATE OF OHIO.

APPELLEE.

BRIEF FOR APPELLEE.

STATEMENT.

Appellants on March 9th, 1901, filed in the original trial Court an amendment to their Bill of Complaint, which was evidently found necessary by the more careful examination of the law, and which seems to impute to the respondents, malice, bad faith in the execution of his official duties, and favoritism to complainants' competitors. It was deemed proper therefore to file an affidavit of the respondent below controverting such statements and a number of other statements contained in the original bill, so that if it were sought

on the part of complainants to have had their provisional injunction granted upon the theory that all the acts, motives, malice and bad faith alleged are admitted to be true, they were denied with full force and therefore cannot possibly be the basis upon which a provisional injunction could have been granted in this case.

GROSSLY IRRELEVANT MATTER.

The Bill of Complaint is filled with irrelevant matter, arguments, speculations and the like. These should be eliminated by the Court in considering this cause. For instance, the fact that the complainants have hundreds of thousands of dollars and millions of pounds of coffee invested, does not entitle them to any greater consideration than they would be entitled to if they were dealers on a more moderate scale. Likewise the further allegation to the effect that they have continuously practiced this method of coating their product for a long period of time, cannot possibly have any weight or consideration in this case, although Counsel seem to assume from the attention given such allegation, that having so long manufactured the article in the manner stated, the complainants had acquired some prescriptive right, whereby they were not amenable to the laws of Ohio. Likewise the numerous allegations as to the healthfulness of "Ariosa," are wholly irrelevant. A reading of the Statute will convince one that the question cannot be raised. "Irish moss" is brought into the case. After being brought into the case, it is then taken out and the statement made that it has not been used for twenty years. We respectfully submit that this might well be eliminated from the Bill of Complaint.

The fourth allegation is that the complainants have, at a large expense, widely advertised their product. We submit that this allegation can have no weight or influence in determining the question involved. The fifth allegation is to the effect that the complainants have caused a label and statements to be made upon the back of their sealed packages, consisting of a very flattering series of statements as to the

merits of their compound, which can have no possible bearing here, but, concluding with the formula, which we shall discuss later and show to the Court to be a mere attempt to substitute form for substance.

The further statement contained in the sixth allegation of the Bill of Complaint to the effect that the consumers have had very favorable experience in using complainants' coffee and that a great many people have preferred it to other brands, and that it has gained a great reputation and sale among the people of Ohio, and has a very palatable taste, and is a good and cheap article for the people to use, and that the complainants have the confidence of the purchasers and consumers are all matters that must be ignored by the Court and cannot possibly be considered fro many legal standpoint whatever.

Taking up the seventh allegation we find that we are informed as to four different methods by which coffee roasters attempt to deceive the public. Of course this matter has nothing to do with the case.

In the eighth allegation, we are assured that complainants' process does not include any of the foregoing processes and we are again furnished with a long statement concerning fresh eggs and refined sugar, all of which is set forth at length in a previous part of the Bill.

The ninth paragraph is also open to the objection last stated.

By the tenth allegation we are informed that the complainants have a large stock, amounting to millions of pounds in Ohio and in the United States to ten million pounds, and to the value of from one hundred thousand to one million dollars. The inference seems to be that large dealers in food products are exempt from interference from State authorities. Manifestly the entire tenth allegation is not only irrelevvant but likewise redundant.

The eleventh allegation declares that the respondent, Joseph E. Blackburn, as Dairy and Food Commissioner, without authority of law, and falsely and erroneously considering

the provisions of the Statutes, and notwithstanding the fact that the complainants' product is not in violation of the Statute, and that the Statute is not applicable in the premises, and notwithstanding the fact that a formula of the coffee is plainly printed on every package, will proceed to take certain steps to enforce the law. The greater part of this eleventh allegation consists of the pleading the mere legal conclusions and with the exception of possibly one paragraph therein, should all be ignored.

In the twelfth allegation there is a very long statement as to what effect any intention to prosecute would have upon the number of dollars which complainants might receive from sales of their products in Ohio, and how the market value of stocks of Ariosa might fall, and a lot of other similar allegations, all of which could be just as well pleaded by any person who has been arrested, indicted or who is threatened with arrest or indictment for some crime and it is hardly necessary to say that all of it is purely irrelevant and incompetent.

The thirteenth allegation of complainants' bill sets forth a circular which the Dairy and Food Commissioner issued on February 5, 1901. The statement of what said circular may have done, and as to it being true or false, are wholly irrelevant, and said circular cannot possibly be considered by this Court unless it should be alleged that the respondent intended to or would issue said circular in the future and with this exception, the entire mass of complaint of said circular, is irrelevant.

The fourteenth allegation is to the effect that any prosecution under the respondent's construction of the Statute, would be without authority of law, etc., a conclusion of law that is of course to be argued by counsel, and not to be placed in the Complaint.

The fifteenth allegation likewise avers a legal conclusion.

The sixteenth allegation is a complement to one of the previous allegations in that it is here alleged that if the Statute be construed as respondent claims it should be, it is then

in conflict with the Fourteenth Amendment to the Constitution of the United States, and thereby raises that question; but the allegation does not fail to bring in the coffee, sugar, and eggs and referring again to the great loss which they would have in the way of dollars and depreciation of the market value of stock.

The seventeenth allegation raises the question of interstate commerce which will be argued below.

The eighteenth allegation contains quite a flattering statement as to the great and ponderous number of persons who handle their goods, and in fact complains as to what an inconvenient thing it would be for them to be compelled to see all of these dealers prosecuted and have to defend them. Of course the only inference is that if complainants were small dealers, prosecution would be proper enough, but since they have such gigantic monopoly, they are exempt. The entire eighteenth allegation cannot possibly be considered by this Court in deciding the case at any stage.

THE REAL QUESTION.

Stripped of verbiage, flattering statistics, redundancies, irrelevant allegations and legal conclusions, the Bill of Complaint, exclusive of its formal parts, can be expressed thus:

"Complainants, non-residents of Ohio, ship packages containing a certain food product, to grocers. These grocers sell the same in Ohio. Complainants claim that said food product has not hitherto violated any of the laws of Ohio, and that they do not intend to manufacture it so it will violate the said laws in the future. The respondent, the Dairy and Food Commissoner, is threatening to say that in his opinion the food products do violate the laws of Ohio, and he is unable to say what complainants' conduct may be in the future in that regard. Wherefore complainants pray for two things; first that the Dairy and Food Commissioner may be enjoined from saying that in his opinion complainants' goods violate the Statute of Ohio; and second that he be enjoined from arresting any person who may be found at any time, in any

place, selling any goods which on the outside packages thereof, has the complainants' name and trademark."

In other words they simply say, "We have never violated any of the laws of Ohio in the past and don't intend to in the future, and desire all the executive machinery, investigations, unfavorable reports of chemists, etc., etc., enjoined, not only as to us, but as to any person selling our goods."

THIS CASE REPORTED.

The report of this case will be found in 51 U. S. C. C. A., 122.

The clear, concise and able opinion there given by Mr. Justice Day would be marred by any excerpt, and we therefore respectfully ask its careful perusal by this Court. In itself it is a sufficient answer by way of argument, to the contentions of appellants herein.

PRECEDENTS FOR THIS ACTION.

Cases exactly similar to the one at bar are extremely rare. Indeed the boldness of this proceeding and the unprecedented action sought to be taken have never been sustained by any authority. Therefore it is not surprising that similar cases to it are rare. We find but two in Ohio, and they are exactly in point.

First, the case of Williams et al. vs. McNeal, Dairy and Food Commissioner, which was decided in 1892, 7 C. C., 280 where the Court holds as follows:

> "1. The Dairy and Food Commissioner is authorized to print, publish and circulate such matter as may be necessary to inform dealers and the public of violations of the laws against fraud and adulteration or impurities in food, drinks or drugs.
>
> "2. Section two of the act of March 21, 1887, (85 Ohio Laws, 216, Section 7458-17, Revised Statutes) is valid and constitutional."

We invite the Court's attention to this case and the decision of the Court therein.

The second case is that of the Pre-digested Food Company vs. McNeal, Dairy and Food Commissioner, decided by Judge

Smith of the Superior Court of Cincinnati, in 1895, and is reported in 1st Ohio Nisi Prius Reports, 266.

While this is a decision of one of the inferior Courts of Ohio, nevertheless the decision of Judge Smith in this case is so able and exhaustive that it is with the greatest of pride that this case might be cited to any Court. The decision is about as lengthy as our entire brief, and we submit that decision to this Court in the greatest confidence.

We find no cases at all in favor of Complainants' action.

SUIT AGAINST THE STATE.

The action affects and is for the benefit of third parties, to wit retail grocers who now or hereafter may sell Complainants' product. The real effect of this action on the part of complainants seems to be not to enjoin the respondent from arresting them, but that the injunction which is to issue, shall be for the benefit and use of the many persons who may buy their product, amounting as they say to about ten thousand persons in Ohio now.

On the part of the respondent the injunction does not seek so much to bind him, since he personally does not make any arrests or swear to any affidavits. To be effective therefore the injunction must control all the prosecuting attorneys of Ohio, all the inspectors, and atttorneys for the department, chemists, etc., none of whom are parties to this action.

Of course if this injunction should be granted, we presume that all the professors in the State of Ohio and especially the expert chemists who should find, according to their analysis, that Arbuckle's coffee was adulterated, would be compelled to come to a different conclusion, because of the injunction.

More than this, any citizen in Ohio may file an affidavit charging any person with violating any criminal statute.

Therefore this injunction, to be of any avail, must bind all persons representing the State of Ohio as well as its citizens, and therefore it is in substance and effect against the state.

In the case of Cunningham vs. R. R. Co., 109 U. S., 446, it is held in the second syllabus that:

"Whenever it is clearly seen that a State is the indispensable party to enable the Court, according to the rules which govern its procedure to grant the relief sought, it will refuse to take jurisdiction."

And in this same case, the case of Davis vs. Gray, 16 Wall., 203, is questioned and a perusal of the two cases will be sufficient to convince the Court that the dissenting opinion of Chief Justice Marshall in the old case of Davis vs. Gray, is now the law of the land. And the Court lays down the doctrine that the indirect way of making the State a party, is just as open to objection as if the State had been named as a defendant.

AS TO ARIOSA BEING A PATENTED ARTICLE.

We cannot agree with counsel that the law makes a distinction between articles which have been patented and articles which have not been patented, and that while the latter are subject to the laws of the State and its vendors compelled to abide by them, but that the former and its vendors are exempt. Apellants say in their complaint in substance that a patent having been granted to the compainants for this article, if the Ohio Statute prohibited its sale or offer for sale, then said Statute is in conflict with the lawful powers of the United States. All reasoning is manifestly against any such discrimination, and the decisions do not sustain this contention. This question was raised very pointedly in the case of Palmer vs. The State, 39 O. S., 236. In that case John Palmer was convicted of violating the pure food statutes of the State of Ohio. His defense made in the Police Court was that the substances sold by him were manufactured under letters patent issued by the United States and that therefore the law in so far as it applied to him, was unconstitutional and void. In that case in the Supreme Court of Ohio, the Court says:

"The patent laws of the United States give to inventors the exclusive right to their inventions, but do not give to them the right to disregard laws enacted to promote the

welfare of the whole people. The State cannot discriminate against patented articles by imposing upon their sale conditions and restrictions not placed upon the sale of other similar articles; but the sale of all articles like those now under consideration, whether patented or not, may be restricted, regulated or forbidden, whenever the public good requires such restriction, regulation or prohibition.

These principles have been recognized and illustrated in a number of cases decided by this Court, and by the Supreme Court of the United States. Among the leading cases are Jordan vs. Overseer of Dayton, 4 Ohio, 295; State ex rel. vs. Telephone Co., 36 Ohio St., 296; Patterson vs. Kentucky, 97 U. S., 501; and Webber vs. Virginia, 103 U. S., 344.

It is claimed, however, that laws regulating the sale of patented articles can be sustained only when they come fairly within the police powers of the State; and those powers extend only to regulations relating to the health, morals, good order and comfort of the people, and that the provisions of Section 7090 are merely intended to prevent fraud. The language of the act supplementary to Section 7090, passed April 26, 1881, shows very plainly that the design of the Legislature in passing Section 7090 as well as the supplementary section, was to prevent the sale of impure and unwholesome food, and that both sections, therefore, come within the most narrow definition of police regulations. If it were conceded, however, that none of the substances described in Section 7090 are positively injurious to health, we hold that the law is within the general powers possessed by the State. Those who buy food have a right to know what they buy, and to have the means of judging for themselves as to its quality and value."

And we would call the court's special attention to the case of Patterson vs. Kentucky, 7 Otto., 501, which unequivocally holds that the rights conferred upon a patentee must be exercised in subordination to the police regulations which the State has established by Statute.

AS TO THE CONSTITUTIONALITY OF THE STATUTES.

We apprehend that the claim set forth that the dairy and food Statute of Ohio in question here, is repugnant to the Constitution of the State and of the United States is not very seriously contended for. In the very limited time before us, we will discuss it but briefly.

> "It being within the Constitutional power of the Legislature to establish regulations for the prevention of fraud in the sale of articles of food, it is generally for the Legislature to determine what regulations are needed for that purpose."
>
> Cooley's Const. Lim., 3rd Ed., 168.

In the case of Commonwealth vs. Huntley, 156 Mass., 236, it is held as follows:

> "The enactment of a Statute which forbids the manufacture and sale of oleomargarine which is made in imitation of yellow butter is a valid exercise of the police power which remains in the several States, though such oleomargarine has been imported from another State; and it is not in violation of the constitutional provision giving to Congress the power to regulate commerce among the several States."

And likewise in the case of Powell vs. Penn., 127 U. S., 678, the Court holds:

> "(1) The Fourteenth Amendment to the Constitution was not designed to interfere with the exercise of the police power by the State for the protection of health, the prevention of fraud, and the preservation of the public morals.
>
> "(3.) Whether the manufacture of oleomargarine or imitation butter of the kind described in the Act of the Legislature of Pennsylvania of May 21, 1885 (Laws of Penn. of 1885, p. 22, No. 25) is, or may be, conducted in such a way or with such skill and secrecy as to baffle ordinary inspection, or whether it involves such danger to the public health as to require for the protection of the people the entire suppression of the business, rather than its regulation, in said manner as to permit the man-

ufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy, which belong to the legislative department to determine.

"(4.) The Statute of Pennsylvania May 21, 1885, 'for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof, neither denies to persons within the jurisdiction of the State the equal protection of the laws; nor deprives persons of their property without that compensation required by law; and is not repugnant in these respects to the Fourteenth Amendment to the Constitution of the United States."

And we would also call the Court's attention to the case of Schollenberger vs. Pennsylvania, 171 U. S., 1, where the subject is further discussed and the case of Powell vs. Penn., reaaffirmed; and also the case of Plumley vs. Mass., 155, U. S., 461.

The general food act of Ohio (the one involved in this controversy) is copied verbatim from a New York Statute which, in turn, is copied from a Statute of Victoria. The law has stood the test of scores of courts in this country and in England. In Ohio this Act has been approved by the Supreme Court in the following cases:

State vs. Cap. City Dairy Co., 62 O. S., 350;
Palmer vs. State, 39 O. S., 236;
Meyer vs. State, 54 O. S., 242;
State vs. Kelley, 54 O. S., 166;
State vs. Dreber, 54 O. S., 115;
State vs. Ruedy, 57 O. S., 224;
Hutchison vs. State, 56 O. S., 82.

We call attention to a recent utterance of the Supreme Court of the United States, in Gundling vs. Chicago, which involved the right of the city to forbid the sale of cigarettes without a license, opinion by Mr. Justice Peckham:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation

they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for federal interference.

"It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. * * * So long as the State law authorizes both regulation and taxation it is enough, and the enforiement of the ordinance violates no provision of the Federal Constitution."

AS TO ARIOSA BEING A COMPOUND.

The Statute under consideration (Bates, 4200-6) excepts from its operation, mixtures and compounds where the package is labeled as a mixture and compound with the name and per cent. of each ingredient therein. The Court will readily perceive the object of this exception. If a person sell a mustard, it must be pure mustard and must comply with the Statute. If a person sell olive oil, it must be pure olive oil, and must conform to the Statute, and so with all the ordinary foods, because when a person asks for any of these well known foods, he must get a pure food, and have a right to demand without further words that they receive the pure article. But if a person invent a mixture there is no danger of anybody buying that for something else and believing it to be something else. For instance, no person would buy Peruna and expect it to be composed of pure olive oil. If a man invent a mixture which he calls "Swamp-Root Bitters," no person is going to be misled or deceived by supposing that it is something else, or that is a pure article, because there is no such article recognized and known to the general public, which could be confounded with that article. If a man invent a compound, which we will call "Mealine," that word does not suggest anything to the mind

or to the person except that it is a mixture of some kind and such a person has a right to sell "Mealine" and on the outside of the package label it as composed of a certain per cent. of meal, a certain per cent. of flour, and a certain per cent. of sugar, etc. The practice adopted by the complainants in calling their coffee Ariosa, labeling it a compound and pretending it is an article composed of and made up of three separate ingredients, is a trick and device so patent that its absurdity carries with it its own refutation. This substance is coffee, sold in a form that every berry is separate and distinct, and is merely coated and varnished. If complainants' product be a compound then every cheat and fraud need only to coat, color and varnish their various inferior grades of foods, and call it a compuond. This substitution of form for substance, may have pleased the appellants, but a little reflection ought to have convinced them that they could not in a court maintain such an evasion of the law. Of course, by this claim of being a compound they admit that the glazing is a violation of law and only seek to save themselves by coming within the exception.

STATUTES AFFECTING APPELLEE.

The following statutes define the appellees' duties:

Section 409-7: "(Ohio Dairy and Food Commissioner; Salary and Expenses.) That there is hereby created the office of dairy and food commissioner of the State of Ohio. Said commissioner shall be elected at the general election held on the first Tuesday after the first Monday in November, A. D. one thousand eight hundred and ninety-six. He shall take his office on the first Tuesday following the fifteenth day of February next after his election, and shall serve for two years, and until his successor is elected and qualified. He shall be charged with the enforcement of all laws against fraud and adulteration or impurities in foods, drinks or drugs, and unlawful labeling in the State of Ohio. His salary shall be two thousand dollars ($2,000) per year, and his necessary and reasonable expense incurred in the discharge of his official duties, to be paid in monthly installments at the end of each calendar month."

409-8. (General Duties of Himself and of His Assistants.) It shall be the duty of said commissioner or assistant commissioner, to inspect any articles of butter, cheese, lard, syrup or other article of food or drink and to prosecute or cause to be prosecuted any person or persons, firm or firms, corporation or corporations, engaged in the manufacture or sale of any adulterated article or articles of food or drink, or adulterated in violation of, or contrary to any laws of the State of Ohio."

409-9. (Powers; Prosecutions.) The said commissioner, or any assistant commissioner, shall have power in the performance of their duty, to enter into any creamery, factory, store, salesroom, drug store, or laboratory, or place where they have reason to believe food or drink are made, prepared, sold or offered for sale, and to examine their books, and to open any cask, tub, jar, bottle, or package, containing or supposed to contain any article of food or drink, and examine or cause to be examined and analyzed the contents thereof, and it shall be the duty of any prosecuting attorney in any county in the state, when called upon by said commissioner or assistant commissioner, to render him any legal assistance in his power, to execute the laws, and to assist in the prosecution of cases, arising under provision of this act."

409-10. (Assistant Commissioners, Experts, etc.; Expenses, Office, Report, etc.) Said commissioner may appoint not to exceed two assistant commissioners, whose salaries shall be one thousand dollars per year, and necessary traveling expenses incurred in the discharge of their official duties, to be paid in like manner with the commissioner's and on itemized vouchers approved by said commissioner; the said commissioner shall have power to employ such experts, chemists, agents, inspectors and counsel as may by him be deemed necessary for the proper enforcement of the laws, their compensation to be fixed by the commissioner." * * *

409-13. (Dairy and Food Commissioner to Give Bond.) The Ohio dairy and food commissioner, before entering upon the discharge of his official duties, shall give bond in the sum of five thousand dollars to the state, with two or more sureties to the acceptance of the governor, conditioned that he will truly account for and apply all

moneys or other property which may come into his hands in his official capacity, and for the faithful performance of the duties of his office as the same are prescribed by law; which bond with his oath of office indorsed thereon, shall be filed with the secretary of state.

SUGGESTIONS ON APPELLANTS' BRIEF.

It is conceded by complainants in their brief (page 2) in speaking of the coating and glazing of their product, that "its effect upon the appearance of the coffee is that of varnish. * * accentuating the color of each berry." It is this very act which is prohibited by the Statute. It forbids the sale in this state of any food "if it is colored, coated, polished or powdered, whereby damage or inferiority is concealed or if by any means it is made to appear better or of greater value than it really is." It is not the province of this court to determine here whether or not complainants' act as stated by them is or is not a violation of the Statute. It is not the province of the respondent to show and prove the effect of this varnishing, coloring and coating, nor other improvements and adulterations of this product. The question to be decided by this Court in this hearing, must be those of law only and therefore we expressly disclaim any intention of entering upon the merits of the case in this discussion.

So far as this Court is concerned, the decision on this hearing must be the same, whether appellants' product consists of the vilest and most poisonous adulterations, or whether this treatment of its product is harmless. In either event that fact is immaterial and no prejudice should arise in favor of either party by any allegations in that behalf.

The further fact that appellants have been selling this product for thirty years, does not make their case any better than that of the man who has been selling for ten years or one year. The further allegation as to the labeling on the outside of each package, cannot affect the case. The further argument that the respondent, as dairy and food commissioner has notified complainants as to his views upon the product sold by them,

simply shows the fair and honorable manner in which he is attempting to conduct his office. Instead of arresting ten thousand dealers suddenly and without notice he gives appellants full time and notice as to their product in order that they may so amend their methods as to conform to the law. But it seems that having given them sufficient time and notice to thus conform to the law, this fact is made one of the reasons why he should be enjoined. Counsel mistake the meaning of the word "adulteration" as used by the Statute. In order that but one word may be used and that this word might have a particular meaning, the Statute describes what shall be deemed adulterated, so that the word must be used in its statutory significance and meaning there defined and not by the meaning which counsel attempt to give it. The further contention of counsel that this coffee is wrapped up and sealed up in a wrapper so the purchaser cannot see the coffee, can certainly have no bearing on the case.

INTERSTATE COMMERCE.

It is alleged in the complaint that this coffee is packed in packages and shipped to dealers in this State who then retail it. This is so manifestly the fact that no argument need be advanced or proof produced to establish it. The facts therefore and the manner of the sales by the grocers in Ohio are of such a character that they do not bring them within the protection claimed. If the Dairy and Food Commissioner had attempted or was about to attempt to prevent Arbuckle from selling a product to a grocer in Ohio, the question might be raised, but after the big sale between Arbuckle and his customer takes place and the wooden box with the contents has become the property and owned by a citizen of Ohio, and the citizen then begins to sell it as his own property, the protection of the Interstate Commerce feature is lost. This is too apparent to need further argument.

But further answer can readily be given to this contention of counsel. In the case of Commonwealth vs. Huntley, 156 Mass., 236, it is held as follows:

(4th syllabus.) "The enactment of a statute which forbids the manufacture and sale of oleomargarine which is made in imitation of yellow butter is a valid exercise of the police power which remains in the several States, though such oleomargarine has been imported from another State; and it is not in violation of the constitutional provision giving to Congress the power to regulate commerce among the several states."

The case of Plumbley vs. Mass., found in 155 U. S., 461, is certainly authority upon this point. In this case the Supreme Court of the United States holds that the State Legislature has power to enact a law *absolutely forbidding* the manufeature and sale of a certain food product, and further that a statute to prevent deception in the manufacture and sale of food products as to a food stuff brought into the State of Massachusetts, is not in conflict with the clause of the United States Constitution, investing Congress with power to regulate commerce among the several States. And that Court realizing that the case of Leisy vs. Hardin, 155 U. S., 100, had been decided without reference to the police power regulation of the several States, holds that the case of Leisy vs. Hardin "is restrained in its application to the case there actually presented for determination, and held not to justify the broard contention that a State is powerless to prevent the sale of articles of food manufactured in, *or brought from another State*, and subjects of traffic, or commerce, if their sale may cheat the people into purchasing something they do not intend to buy, and which is wholly different from what its condition and appearance import."

Indeed the decisions have well established that while matters of Interstate Commerce are subject to the control of Congress yet the individual States are entitled likewise to some control which is so manifest in the exercise of its police power, especially as to matters which are local in their nature and operation.

"The line of distinction," says Judge Cooley, "between that which constitutes an interference with commerce, and that which is a mere police regulation is sometimes exceedingly dim and shadowy, and it is not to be wondered at that learned jurists differ when endeavoring to classify the cases, which arise. It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish and to descend to the most minute directions if it shall be deemed advisable; and that to whatever extent ground shall be covered by those directions, the exercise of State power is excluded. Congress may establish police regulations as well as the States, confining their operation to the subjects over which it is given control by the constitution. But as the general police power can better be exercised under the supervision of the local authority, and mischiefs are not likely to spring therefrom so long as the power to arrest collision resides in the national courts, the regulations which are made by Congress do not often exclude the establishment of others by the State covering very many particulars."

Cooley's Const. Lim. (5th ed.), 724.

These doctrines are all exemplified and sustained in the following cases:

Ferry Company vs. Penn., 114 U. S., 196;
Kimmish vs. Ba., 129, U. S., 217;
Patterson vs. Kentucky, 7th Otto., 501;
Hinson vs. Lott, 8 Wall., 148;
Turner vs. Maryland, 107 U. S., 38.

AS TO ENJOINING EXECUTIVE DISCRETION.

It may be laid down as the correct rule of law that where the law imposes a definite and single line of action or duty upon a public official concerning which he must act and over which he has no discretion, and concerning which no issue of facts arises, an injunction may issue to prevent such action on his part, if the law be void, or on the other hand mandamus may issue to compel him to perform that duty. *But counsel may search in vain for either a precedent or a good reason for*

a court interfering in cases where the executive is merely exercising his judgment as to the guilt or innocence of a citizen by causing the arrest or refusing to cause the arrest of any citizen for alleged violation of a valid criminal statute.

In brief the Court will never substitute its judicial control for mere executive discretion.

It is right at this point and on this subject that counsel for appellants, have, in our opinion, erred. And we respectfully submit without controverting any of the cases cited by them, that all such cases so cited, fall within the first proposition above named. With this distinction this cause becomes clear and the cases are all harmonious.

The reason is apparent. A discretion subject to judicial control is one to be exercised, not according to the judgment and conscience of the one in whom the law confides it, but according to the judgment and conscience of another in whom the law does not confide it. The Court will therefore observe that in all the cases cited, those which hold in favor of judicial control by mandamus or injunction of an executive officer, relate to matters in which the law has imposed or attempted to impose a definite and single line of action or duty upon such public official, concerning which he has no discretion; and that the cases refusing it, fall within those incidents where the law itself is not questioned but issue is taken with the opinion or executive discretion of the officer himself.

As facetiously stated in the case of Judges vs. The People, 18 Wend., 79-99,

> "We have a power in ourselves to do it, but it is a power which we have no power to do."

And further,

> "As a matter of faith, we can assent to the theological dogma of 'an overruled free agency,' but in a matter of legal reasoning we are justified in asking for pretty strong evidence to convince us that a judicial discretion can exist independently of the right or power of exercising it."

Perault vs. Rand, 10 Hun., 222, holds that

> **"A court of equity will not restrain by injunction a court martial from trying one, subject to its jurisdiction where he alleges as the only ground of injunction, that he has already been tried on the same charge and that he apprehends that the second trial will be unfairly conducted."**
>
> **See High, Section 46.**

There are well reasoned cases which even go so far as to hold that the legislature itself can not invest the judicial department of the government with authority to assume jurisdiction over legislative or executive departments.

Sterling vs. Doake, 29 O. S., 457;
State vs. Nichols, 26 Ark., 74;
State vs. Sloss, 25 Mo., 291;
Atty. General vs. Brown, 1 Wis., 513;
Haley vs. Clark, 26 Ala., 439;
Smith vs. Myers, 109 Ind., 1.

In the case of Cunningham vs. R. R. Co., 109 U. S., 446, the court holds (page 452 et seq.) that a class of cases has arisen which gives rise to some controversy, and that is where the law has imposed upon an officer a well defined duty in regard to a specific matter in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process. But the court holds (page 453):

> "But in all such cases from the nature of the remedy by mandamus, the duty to be performed must be merely ministerial and must involve no element of discretion to be exercised by the officer."

And the Court there cites the authorities for this doctrine.

And the Court commenting upon the bold stand taken in the case of Davis vs. Gray, 16 Wall., 103, says: (P. 453):

> "But it is clear that in enjoining the governor of the State in the performance of one of his executive functions the case goes to the verge of sound doctrine, even beyond it, and that the principle should be extended no farther."

Further in the same case the court (page 454) quotes the language of Mr. Justice Bradley, and commenting upon it says it is well and tersely expressed as follows:

> "The objection to proceedings against State officers by mandamus or injunction are, first, that it is in effect proceeding against the State itself; second, that it interferes with the official discretion vested in the officers. It is conceded that neither of these can be done. A State without its consent cannot be sued as an individual; and the court cannot substitute its own discretion for that of executive officers, in matters belonging to the proper jurisdiction of the latter. But it has been settled that where the plain official duty requiring no exercise of discretion is to be performed, a performance is refused, any person who will sustain a personal injury by such refusal may have a mandamus and compel performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain a personal injury thereby for which adequate compensation cannot be had at law, may have an injunction to prevent it."

In the case of Gaines vs. Thompson, 7 Wall., 347, the Supreme Court of the United States holds in the syllabus as follows:

> "The act of the Secretary of the Interior and the Commission of the Land Office in cancelling an entry for land, is not a ministerial duty, but is a matter resting in the judgment and discretion of these officers as representing the executive department. Accordingly this court will not interfere by injunction more than by mandamus to control it."

And the court here quotes (page 351) the language used by Chief Justice Taney in the case of Commissioner of Patents vs. Whiteley (4th Wall., 522):

> "In general such duties whether imposed by Act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in ex-

pounding the laws and resolutions of Congress under which he is required to act."

And continuing, the court says, that if a suit should come before a Court involving the construction of any of these laws, the court would not be bound to adopt the construction given by the head of the department and if they thought his decision wrong, they would of course so pronounce their judgment. But that this judgment upon the construction of the law must be pronounced in a different manner than that contended for, and that the court would not by mandamus "act directly upon the officers and guide and control his judgment or discretion in the matters committed to his care in the ordinary exercise of his official duties. The interference of the Courts with the performance of the ordinary duties of the executive department would be productive of nothing but mischief."

U. S. vs. Seaman, 17 Howard, 225;
U. S. vs. Guthry, 17 Howard, 284;
U. S. vs. Commissioner, 5th Wall., 563.

We call especial attention of the Court to this case of Gaines vs. Thompson, 7 Wall., 347, for the reason that the discussion of the principals is so thorough and the cases reviewed commencing with the famous decision of Chief Justice Marshall, in the case of Marberry vs. Madison (1st Cranch, 137).

The foregoing case of Gaines vs. Thompson is again reaffirmed in the case of Litchfield vs. Register, 9 Wall., 576, where the doctrine contended for by the respondents in this case again is sustained.

To the same effect is the case of State of Georgia vs. Stanton, 6 Wall., 50, very ably argued. And the court holds that such a decision would call for a judgment upon the political question and will therefore not be entertained by the court.

In the case of the State of Mississippi vs. Andrew Johnson, President, 4th Wall., 475, the court holds that the President of the United States cannot be restrained by injunction from carrying into effect an act of Congress alleged to be uncon-

stitutional. In that case the court very clearly distinguishes between discretion and a positive line of action, and holds (page 498) that

> "A ministerial duty, the performance of which may in proper cases be required of a head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist and imposed by law." The Court further holds in the case of Marbery vs. Madison, and likewise in the case of Kendall vs. Stockton that "nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance it was held, might be required by mandamus."

The court then very clearly shows the absurdity and injustice of attempting to direct or control an officer in the exercise of mere discretion in the enforcement of law.

And upon the contention strongly urged that an injunction should issue to restrain such action under the Legislature, which is alleged to be unconstitutional, the Court holds that that circumstance would not take the case out of the general principles which forbid judicial interference with the exercise of executice discretion.

In Cohen vs. Commissioners, 77 N. C., 2, plaintiff complains of illegal town ordinance under which he was constantly being arrested. Injunction refused.

In Fickle vs. Commissioners, 66 How. Pr., 318, court holds against injunction for illegal arrest on ground plaintiff has prompt relief by habeas corpus and injunction refused to prevent defendant commissioners from closing up plaintiff's business.

In Hinton vs. Sheriff, 46 Ga., 350, it is held in the syllabus, that:

> "The issuing of executions by the Comptroller General to collect the public revenue due to the State is the act of the Executive department of the Government and the Courts have no power to prescribe the kind or sufficiency of the evidence which shall be necessary to authorize the

process of execution to issue against defaulting officers or agents or to restrain that department in pursuing this cause."

In the case of Chicago vs. Wright, 69 Ill., 318 it is held that

"A Court of equity has no power to enjoin the exercise of the police powers given by law to the officers of a municipal corporation."

And further that,

"The Court has no jurisdiction to interfere with the public duties of any of the departments of the government or override the policy of the State."

In the case of R. R. Co. vs. DeGraaf, 27 Minn., it is held that,

"No act done or threatened to be done by any member of the executive department of the State government in his official capacity can be brought under judicial control or interference by mandamus or injunction whether such act proceeds from an error of judgment or misapprehension of official duty under the law."

"This rule applies both to ministerial acts and those which involve the exercise of judgment and discretion, and also to acts done in the performance of every official duty, whether it arises out of the Constitution or a legislative enactment."

The case of Osborne vs. Bank, 9 Wheaton, 738, cited by complainants involved the sole question as to whether or not the Legislature of the State of Ohio could legally tax the United States Bank. There was no discretion of any kind involved in the duty of the state officer enjoined.

"Injunction will not be granted in any case to restrain an act which is being or about to be done in the legitimate exercise of judicial of official discretion. And a board of county commissioners is a court of inferior and limited jurisdiction, and though statutory powers conferred on such tribunal must be strictly pursued, in accordance with the course pointed out, yet when such a court has been entrusted with the exercise of discretionary powers and the acts done are within the power

conferred, and have been performed in good faith, then no court possesses the power to interfere or control such discretion. Accordingly where supervisors have jurisdiction to review the orders of commissioners of highways on appeal, equity will not interfere with their action when they proceed regularly in the exercise of such jurisdiction. Nor will a board of county commissioners be prevented by an injunction from changing the depository of the public moneys of a county, when in the discretion of the board it is deemed best that a change should be made, nor will they be restrained in anticipation of their paying alleged illegal claims, it not being alleged that there is an excess of jurisdiction on the part of the board. So an order of county court establishing a ferry is a judicial act, which cannot be set aside except on appeal, and the exercise of the privilege conferred thereby cannot be prevented or restrained by an order of injunction issued by another court in an independent or distinct action or proceeding."

Spelling on Extraordinary Relief, Section 617.

"Executive State Officers. — It would be difficult to lay down an unqualified rule defining the powers of courts of equity to restrain by injunction the acts and conduct of executive officers of the State and the heads of departments in the national government. The partition of government into legislative, judicial, and executive branches implies, and constitutions usually expressly provide for, the independence of each and prohibit encroachments upon the proper province of each by either of the others; and yet an examination of the decisions discloses that State officers, even governors, have been virtually subjected to the rule which applies in the case of county and town officers, that is, they will not be interfered with in the exercise of duties which require the exercise of discretion, but will be enjoined from the doing of acts which are purely ministerial in character when not authorized by law." Idem, 623.

"The delivery of a certificate of election to one claiming to have been elected a member of Congress is an act calling for the exercise of judicial discretion on the part of the governor of a State and cannot be controlled by injunction. And if the President of the United States

is in any case subject to the civil jurisdiction of the courts in matters pertaining to his official duties, it is plain that he cannot be enjoined from executing an act of Congress claimed to be unconstitutional until such act has been passed upon by the courts since the duty of judging of the validity of laws with reference to their constitutionality is imposed upon him by the constitution, and necessarily calls for the exercise of judicial discretion in its performance; and it is immaterial in such case whether the President be described by his official title or be proceeded against as a citizen of a State. So a cancellation of a land entry in the land office cannot be enjoined, it being considered the exercise of a discretionary rather than a ministerial duty. But there are several cases in which the power of interference by the courts with acts by executice officers was denied irrespective of the character of such act whether ministerial or discretionary, legal or illegal, there being considered to be a lack of jurisdiction over the subject matter."

Spelliing on Extraordinary Relief, Section 625.

"No court has jurisdiction to interfere with the public duties of any of the departments of the government, or to override the policy of the State; and a court of equity is without power to enjoin the exercise of the police powers given by law to the officers of a municipal coropration, so as to prevent such officers from preserving the public peace, such for instance as keeping a public street open to public use. Nor will an injunction issue to restrain an interference by the police authorities with the business of a liquor dealer by arresting him and his employes. If the arrests are illegal, habeas corpus and suit for damages afford him ample remedy. And an injunction was refused where sought to restrain the police authorities within a metropolitan police district from placing policemen in front of a public house in which guests had been repeatedly subjected to unjust, exorbitant and illegal charges and from giving warning to strangers about to enter to be careful. Nor does it alter the case that police supervision is exercised in an arbitrary and unlawful manner."

Spelling on Extraordinary Relief, Section 628.

ACTION FORBIDDEN BY STATUTE.

It is provided by Section 720, Revised Statutes of the United States as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

And it is held in the case of In re Long Island Trans. Co., 5th Federal Reporter, 628, that this action applies to the restraint of suits which, but for the injunction, the State Court would have the jurisdiction over.

The object of complainants' action here is manifestly to prevent any action being taken against third persons, to wit, about ten thousand grocers or any one of them in the State Court and whatever may be the form of this action, its result is clearly in violation of Section 720 above quoted. An exception to this rule can only occur where the injunction is to restrain the prosecution in a State Court and multiplicity of suits after there had been a sufficient number of trials and cases had to justify the assumption that further prosecutions would be in violation of law. If, for instance, a few grocers should be arrested in Ohio and the result of the proceedings either on the part of one or the other would be to establish the complainants' claim here, to wit, that their product did not violate the law we might take up that question and discuss it, but no such case exists here.

NO ADEQUATE REMEDY.

Appellants have laid much stress upon the fact that they have no other adequate remedy and that they will suffer a great deal if they are permitted to have any of their customers arrested under the Statute. Of course it is apparent to the court that in order to have any action taken by any court, such as will accomplish their object, they must substitute for the original complainants in this case, the names of the ten

thousand grocers who are to be affected; and they must then substitute for the respondent below, the names of all the prosecuting attorneys of Ohio, the names of all the attorneys for the Dairy and Food Department, the names of all private citizens who might swear out warrants, the names of all the chemists and other scientific men who might render reports after examination, the names of all the inspectors of the Dairy and Food Department who are no wacting and who may hereafter be appointed, and others. It might also be well for the complainants below, after modifying their suit in this manner, to give a bond unto the State of Ohio in a large sum to the effect that they will not violate the law in the future, because it is asking the Court to go a great way it seems to us, to assume that even if they have not violated the law in the past, that they will not or might not do so in the future.

The above suggestions, although ridiculous illustrate in a simple manner what Chief Justice Marshall, (quoted in the case of State of Mississippi vs. Andrew Johnson, President 4th Wall., 475,) characterizes as an "absurd and excessive extravagance."

All the argument which counsel urge, showing their helplessness before the law by reason of their innocence of any crime and their liability to prosecution, is a burden we admit, but it is a burden which must be borne by every citizen of this Republic. It matters not how innocent a man may be of any charge. It matters not how unreasonable a public officer may be in his beliefs or opinions in regard to the guilt of such citizen. Nevertheless the innocence of that citizen must be proved in a tribunal for that purpose, *after he has been charged with the crime*, and cannot be forestalled by an injunction.

Therefore the dealer in Ariosa coffee must like every other citizen, with respect to any other crime, run the risk and assume his burden of being called upon rightly or wrongly, to answer unto the charge of a misdemeanor.

Let us suppose a stronger case: Let us suppose that an

officer charged with the administration of the criminal laws, should publicly declare that he intended to arrest every citizen who sold any kind of coffee, under a mistaken idea on his part that it was an offense under the laws of this State to sell coffee at all; or suppose that he should further announce that he intended to arrest one John Brown, for a theft of a bicycle, although John Brown could prove conclusively his innocence; would either be permitted to come into a court of equity in advance and prove his innocence and enjoin the official?

The Court below therefore was right in refusing to entertain jurisdiction; and as to its action in dismissing the bill, it followed the precedent established in State vs. Johnson, 4 Wall., 475, quoted above.

CASES CITED BY APPELLANTS.

To avoid the effect of the Eleventh Amendment to the Constitution of the United States, the appellants cite numerous cases, all of which seem to be clearly distinguishable from the case at bar. In Pennoyer vs. McConnaughy, 140 U. S. 1, an injunction was allowed against land commissioners of the State of Oregon working irreparable damages under an unconstitutional statute to one having a contract with the State for the purchase of land. In this case the plain ministerial duty of the land commissioners was to execute the contract between themselves and the complainant. In that case Mr. Justice Lamar divides the classes of cases heretofore considered by this Court under the Eleventh Amendment into two classes:

> "The first class is where the suit is brought against the affairs of the State, as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. In re Ayers, 123 U. S., 443; Louisianna vs. Jumel, 107, U. S., 711; Antoni vs. Greenhow, 107 U. S., 769; Cunningham vs. Mason and Brunswick Railroad, 109 U. S., 446; Hogood vs. Southern, 117 U. S., 52.

> "The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, in a like case, to enforce upon the defendant *the performance of a plain, legal duty, purely ministerial*, is not within the meaning of the Eleventh Amendment an action against the State."

In Pennoyer vs. McConnaughy the Court went no farther than to hold that that case fell within the second class as given above and granted the relief sought on the ground that the threatened acts were against the complainants' property rights; that the statute under which such proceedings were being had was unconstitutional and that the duty of the respondent was a plain, legal duty and purely ministerial. All these three essentials are lacking in the case at bar. While, on the contrary, this action can be readily placed in the first class described by the learned Justice, because it is brought against an officer of the State "representing the state's action" for the institution of a criminal proceeding such as is sought to be enjoined here is particularly the action of the State and its exclusive action.

So in Scott vs. Donald, 165 U. S., 58, the court said only that that action was not forbidden by the Eleventh Amendment because, following the principle laid down in In re Tyler, 149 U. S., 164 the rule was

> "That where a suit is brought against defendants who claim to act as officers of a State, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State, for compensation for damages, such suit is not, within the meaning of the amendment, an action against the State."

Similarly in Tindal vs. Wesley, 167 U. S., 204, where the State had authorized the conveyance of certain lands and such lands had been conveyed pursuant to the enabling act, it was held that officers of the State could not after such enabling act had been repealed subsequent to the execution of deeds for the lands take possession of them and avoid the consequences thereof by interposing the Eleventh amendment. It was the trespass of the individuals which the Court forbade.

In Western Union Telegraph Company vs. Myat, 98 Fed. Rep., 335, an injunction was granted by the Circuit Court against members of the Court of Visitation of the State of Kansas and the State Solicitor from enforcing an invalid limitation on telegraph rates, but only after it has been determined that the act creating the Court had attempted to confer upon that tribunal legislative, administrative and judicial functions and that the act was therefore unconstitutional and void.

In this case, it must be observed, there exists the very important distinction noted by Mr. Justice Brewer, then a Circuit Judge in Railway Co. vs. Dey, 35 Fed. Rep., 866. In the latter case the Circuit Court enjoined Commissioners from enforcing certain illegal rates for railroad charges. The distinction then drawn and it applies equally to Telegraph Company vs. Myat, supra, is that in the outcome of the action, the State had no possible concern; that the action was one concerning only the shipper and carrier, and that it involved the interests, rights or dignity of the State in no way. And this same distinction is to be drawn between the case at bar and Smyth vs. Ames, 166 U. S., 466; Prout vs. Starr, 188 U. S., 537; Central Trust Co. vs. Citizens' St. Ry. Co., 80 Fed. Rep., 218; Union Pacific R. R. Co. vs. Alexander, 113 Fed. Rep., 347 and L. & N. R. R. Co. vs. Brown, 123 Fed. Rep., 946. In the case at bar, the State is not only a party in interest, but it is the only party in interest. All criminal proceedings are the proceedings of the State. The sovereign always reserves the right in name and in fact to set in motion the wheels of

criminal procedure. The injunction of a criminal prosecution is, therefore a complete example of a successful challenge of the sovereignty of the State.

So in Jew Ho vs. Williamson, 103 Fed. Rep., 10, the Court did not grant relief from a constitutional but from what it expressly declared to be an unconstitutional statute.

AS TO ENJOINING CRIMINAL PROSECUTIONS.

Counsel for appellants have cited a number of decisions of inferior tribunals, which have departed from the rule and boldly enjoined criminal prosecutions. In each of these cases however, we note that there was involved an unconstitutional statute. In all but one or two the injunction prevented a seizure of property, or tearing down property or civil actions for recovery of a penalty for failure to take out license, etc.

Whether it will ever be seriously urged again in the Supreme Tribunal of the nation that a Court of Equity may stay by injunction a threatened criminal prosecution, if that prosecution might injure sales of property, the question can easily be settled so far as this case is concerned. Because, granting the law to be as laid down in the isolated cases cited by appellants, they do not apply here.

One distinguishing feature is that they involve merely and solely the unconstitutionality of a statute.

The court had nothing further to consider.

But in the case at bar, the Court of equity must sit first as a tryer of fact as to whether or not appellants' food stuffs were adulterated, and after hearing the evidence pro and contra, decide the preliminary question of guilt before issuing the injunction.

ABSURDITY ILLUSTRATED BY PRACTICAL CASE.

Let us give appellants the victory here and return to the Circuit Court for trial. Respondent answers, saying complainants' food stuff was adulterated. The Court proceeds with the evidence. Witnesses are called to prove and disprove the following points:

(1) That rotten eggs were used in coating.

(2) That the egg coating rotted after application.

(3) That unhealthful sugar was used.

(4) That the coating mixture or varnish made of sugar and eggs was a breeder of bacteria and disease.

(5) That coffee berries were not used altogether but artificial paste berries mixed in.

(6) That sticks and stones were mixed in for weight.

(7) That the holes of worm-eaten berries were filled up and concealed.

(8) That the color of the berry was heightened.

(9) That the glazing made No. 8 coffee look like a No. 7 and No. 6, which are higher grades.

(10) That 3-cent sugar placed on the coffee berry was being sold for 14 cents.

(11) That an injurious preservative, salicylic acid, was added to the glazing mixture.

(12) That increased weight was added by the cheap coating and moisture of bean greatly increased.

(13) That the coffee was not Ariosa, but a cheaper grade sought to be sold under that name.

The issues could be multiplied, of course, very much more. After the Chancellor had heard the chemists, experts, and other witnesses, he will be ready (we shall assume) to find the submitted samples pure and unadulterated. But just as he is about to grant the injunction, the respondents suggests that while that may be true as to the samples submitted, how can he know what will be the fact as to purity next month and the years to come. A bond could be ordered to be given by complainants that they will always keep from violating the

food laws in the future, and an inspector appointed by the Court to watch the factory. But here again the respondent suggests that complainants are not retailing in Ohio, but that some "ten thousand grocers" unpack the goods and sell it to the people, and it is well known that much of the adulteration of foods, liquors, oils, syrups, drugs, etc., is done by the retailer, although the manufacturer had sold the pure article.

However, the strong arm of equity could reach these ten thousand grocers who could be made parties and made to give a bond.

But just as the Chanellor, almost in despair, would finally be ready to issue the longed for injunction, the respondent would again humbly suggest that he himself never swore out a warrant in his life; that most of the arrests were caused by citizens who purchased foods for their own use, and respondent could not tell who these persons would be in the coming years.

It must be apparent, therefore, that, conceding the general doctrine of injunction against criminal prosecution most liberally, and that a suit such as this would lie against the state, the Court would not do a vain thing, and from its very nature the writ would have to be refused.

Respectfully submitted,

ROSCOE J. MAUCK,
EDMOND B. DILLON,
Solicitors for Respondent.